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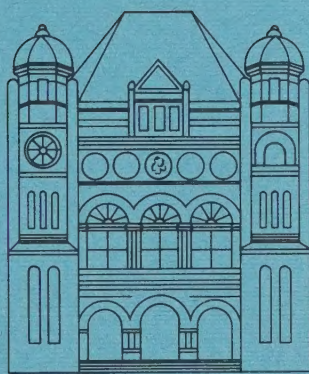
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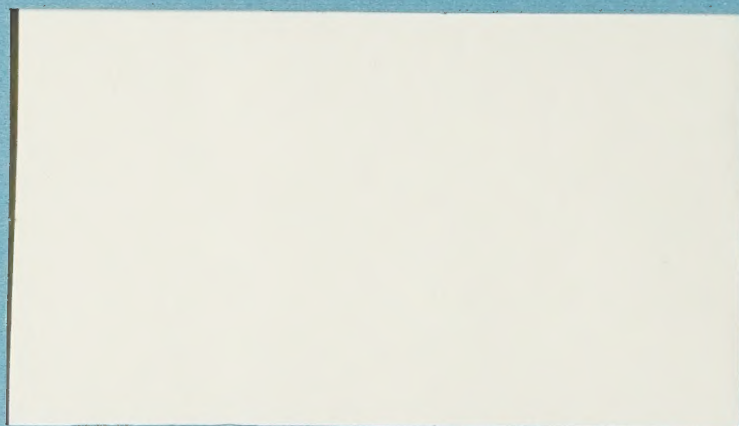
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**AUTOMOBILE INSURANCE IN
ONTARIO AND BILL 164**

Current Issue Paper 135



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**AUTOMOBILE INSURANCE IN
ONTARIO AND BILL 164**

Current Issue Paper 135

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addition, insurance companies were required to provide so-called "no-fault" benefits to all accident victims, regardless of fault.³ These benefits were set out in a schedule to the *Insurance Act*.

Car owners were required to purchase a minimum of \$200,000 in third party liability coverage.⁴ Third party coverage protected the owner from bodily injury and property damage claims by third parties.

Car owners were also required to purchase no-fault benefits coverage. Generally speaking, these benefits were paid by one's own insurance company. In 1990, no-fault benefits included:

- \$25,000 per person for medical and rehabilitation costs (excluding OHIP payments);
- income replacement benefits of up to \$140 per week for two years;
- death benefits of \$10,000 for the death of the head of the household; and
- funeral expenses up to \$1000.⁵

Vehicle damage, or "collision" coverage for one's own vehicle was optional.

Thus, when a person was injured in a motor vehicle accident in Ontario prior to Bill 68, the injured person had an unrestricted right to sue in court for economic and non-economic loss, provided the fault of someone else could be established. The injured person would have been compensated by the at-fault party's insurance company, up to the limits of the third party liability limits in the at-fault person's insurance policy. In addition, anyone injured in an automobile accident would have been entitled to the no-fault benefits provided in his or her own policy.

The fault system as it existed in Ontario before Bill 68 was also known as "partial no-fault" or "add-on no-fault," since no-fault benefits were added on top of the fault system, without restricting an innocent accident victim's right to sue.

Studies of Automobile Insurance Prior to Bill 68

Five major studies of auto insurance in Ontario have been conducted in the last 20 years. The following is a summary of those studies.

Ontario Law Reform Commission: 1973

The Ontario Law Reform Commission has a statutory mandate to examine areas of provincial law that the Commission feels need to be reformed, and to make recommendations for reform to the Ontario government. In its 1973 *Report on Motor Vehicle Accident Compensation*,⁶ the Commission concluded that the fault system was "inadequate, inefficient, slow and expensive."⁷ Specifically, the Commission found that:

- more than half of all persons injured in motor vehicle accidents did not receive compensation under the fault system for their injuries;
- the delivery of compensation was delayed under the fault system, especially for the seriously injured;
- awarding monetary damages for non-economic loss was an inaccurate and inappropriate form of compensation;
- the costs of providing compensation under the fault system almost equalled the compensation actually paid out; and
- the concept that fault should determine the right to compensation is flawed, since personal injury and property damage are, to a large extent, the inevitable result of motoring.⁸

In the view of the Commission, these problems could have been addressed by abolishing the right to sue for damages arising out of a motor vehicle accident and implementing a system where compensation is provided without regard to fault.⁹ Under this system, compensation would be provided to everyone for all economic losses resulting from personal injury, property damage or death caused by a motor vehicle accident, but would not include compensation for non-economic loss.

The Commission also recommended that automobile insurance in Ontario be made compulsory.¹⁰

Select Committee on Company Law Reports: 1977, 1978, 1979

The Ontario Legislature's Select Committee on Company Law, originally established in 1965, was reappointed in 1976 with a mandate to review the law governing the insurance industry. The Committee's mandate included authority to review the existing system of motor vehicle accident compensation.

In its first report in 1977, the Committee recommended that third party liability insurance be compulsory.¹¹ The Committee's second report¹² contained specific recommendations for implementing a compulsory insurance plan, as well as recommendations with respect to motor vehicle accident compensation, government presence in the automobile insurance industry, and the rating classification system.

Regarding accident compensation, the Committee recommended the adoption of a threshold no-fault system, under which the majority of accident victims would be compensated by their own insurance company, without regard to fault, for medical and rehabilitation expenses, loss of income and other economic losses. Compensation for non-economic loss would also be included in the no-fault plan, based on a fixed scale which would set the exact amount of compensation for each type of injury.¹³

Accident victims who sustained "serious and permanent injury" would, under the proposed plan, be entitled to sue for non-economic loss for which no compensation would have been provided under the no-fault plan.¹⁴

The Committee also recommended that compensation for vehicle damage should be provided on a first party basis, that is, by one's own insurance company, rather than by the at-fault party's insurance company.

With respect to the existing rating system in Ontario, the Committee concluded that it was not based on objective, clear or understandable criteria. Therefore, the Committee recommended that a mandatory basic rating classification system be established, under which "discriminatory" rating factors, such as age, sex and marital status would be eliminated and replaced with criteria such as driving experience, driving record and distance travelled.¹⁵

Finally, the Committee considered the possibility of government ownership as an alternative to the existing private sector delivery of automobile insurance. After weighing the advantages and disadvantages of a public system, and reviewing the public insurance plans in the western provinces, the Committee concluded that a privately run system was best suited to Ontario conditions.¹⁶

The Report of the Ontario Task Force on Insurance: 1986

In response to the perception that Ontario was experiencing a crisis in the field of liability insurance in the mid-1980s, the Ontario government appointed the Task Force on Insurance in 1986, chaired by Dr. David Slater. The mandate of the Task Force was to find "solutions for cost and capacity problems in the property and casualty insurance industry in Ontario," with a view to creating long-term "market stability, policy holder protection and a climate of economic opportunity for insurance companies" in the province.

In its 1986 report,¹⁷ the Task Force expressed concerns about the equity and efficiency of the personal injury compensation system in Ontario, and proposed that the first step toward a fairer and more efficient system should be taken in the area of automobile insurance.

The Task Force attributed the liability insurance crisis in Ontario, particularly in the area of automobile insurance, to the increase in the frequency of bodily injury claims and the average cost of those claims. In the view of the Task Force, the increased

use of the court system to secure compensation was a reflection of the inadequacy of the existing accident benefits program.¹⁸

Although the Task Force found no immediate crisis of price or availability in automobile insurance, it predicted that serious problems would inevitably develop. Accordingly, the Task Force recommended the adoption of a pure no-fault system, operated by the private sector, under which the right to sue would be completely eliminated, and all accident victims would be compensated directly by their own insurance companies for economic loss.¹⁹ The Task Force made no recommendations about whether a no-fault plan should include compensation for non-economic loss.²⁰

In the event the government chose to retain the fault system for "special circumstances," the Task Force recommended the creation of a threshold no-fault plan. The Task Force made no recommendations regarding the appropriate threshold.²¹

The Task Force supported the recommendations of the Select Committee on Company Law that the government move to eliminate age, sex and marital status from the automobile insurance rate structure.²²

The Osborne Report: 1988

In 1986, the Ontario government appointed the Honourable Mr. Justice Coulter Osborne, a judge of the Ontario Supreme Court, to head an inquiry into virtually all aspects of auto insurance in Ontario. Justice Osborne was specifically directed to report on the adequacy, timing and fairness of the existing compensation system, and the consequences of implementing different types of no-fault plans.

Justice Osborne's report,²³ released in April 1988, is widely regarded to be the most comprehensive examination of auto insurance compensation conducted in this province. The essence of the report's recommendations was that the fault system

should be retained, but with substantially increased no-fault benefits, and with reform in the area of tort law.

Although Justice Osborne found that no-fault plans were superior to the fault system in terms of compensation,²⁴ and would be slightly less costly to operate,²⁵ he argued that the fault system should be retained, since no-fault systems are inherently unfair in that they provide the same level of compensation to persons who cause accidents as is provided to those who are "innocent."²⁶ Justice Osborne also argued that the tort system has a modest deterrent effect on bad driving.²⁷

With respect to the system of classification of drivers, the Osborne Report recommended that marital status be eliminated as a rating factor, but expressed reservations about the elimination of age and sex.

The Report also recommended that auto insurance should continue to be provided by the private sector.²⁸

A number of reasons have been suggested for the government's rejection of the main recommendations of the Osborne Report. One reason offered is that the government had expected the Report to recommend a move toward threshold no-fault, if not a pure no-fault system.²⁹ This expectation was probably based on the fact that previous studies had recommended such a move, and the government's belief that insurance premiums were threatening to increase exorbitantly at the time the Osborne Report was released.

It has also been pointed out that the conclusions reached in the Osborne Report were based primarily on loss costs (i.e., the amount insurance companies have to pay out for claims) for the year 1986, a year in which loss costs in the auto insurance sector were unusually low. Proceeding on the assumption that loss costs had stabilized, the Osborne Report concluded that the fault system could be maintained, with enhanced no-fault benefits, and not produce an unreasonable increase in premiums. In fact, loss

costs for 1987 and 1988 were substantially higher than those for 1986, thus rendering the assumptions in the Osborne Report invalid.³⁰

Another difficulty with the Osborne Report was the fact that actuaries retained by the insurance industry and the Ontario government concluded that the cost of providing the enhanced no-fault benefits recommended by Osborne would have been significantly higher than predicted by Osborne's actuary.³¹

Ontario Automobile Insurance Board

In February 1988, Bill 2 came into effect, establishing the Ontario Automobile Insurance Board.³² Bill 2 also authorized the government to prescribe a classification system to be used by insurance companies in setting premiums for automobile insurance. A draft classification system, which eliminated age, sex and marital status as rating factors, was prescribed by Cabinet.

The mandate of the Board was to conduct industry-wide hearings on premium rates and on the new classification system, and then set premium rates. If necessary, the Board could vary the proposed classification system. On February 13, 1989, following extensive public hearings, the Board allowed a general premium increase of 7.6%, but permitted companies some leeway with respect to the benchmark rates established for each class of risk. Consequently, rates filed with the Board averaged 17.3% above existing rates.³³

Under the new classification system, which, as noted, eliminated age, sex and marital status as rating factors, many policyholders would have been hit with higher premiums, even though their risk was unchanged.³⁴ For example, senior citizens would lose the discount traditionally given to them on the basis of age, and young female drivers would no longer be charged lower premiums than young males. Coupled with the rate increases approved by the Board, the new classification system created the possibility of significant premium increases for approximately 400,000 policyholders.³⁵

Accordingly, the government suspended the new classification system on April 17, 1989, to allow time for the development of "product reform." Insurance companies were permitted a 7.6% increase as of June 1, 1989. This increase was the last one allowed prior to the introduction of Bill 68.³⁶ According to one source, losses for insurance companies over this period were rising at twice the rate premiums were permitted to increase.³⁷

On March 2, 1989, the government ordered the Board to hold public hearings on three types of no-fault plans: pure no fault, "choice" (where a person may choose to be covered by either a no-fault or a fault plan), and threshold no-fault. Although the terms of reference³⁸ were clear that the Board was to act as a finder of fact, the Board, in its July 1989 report, went out of its way to criticize all three plans referred to it.³⁹

BILL 68

Introduction

In the fall of 1989, the Ontario government introduced Bill 68,⁴⁰ which amended the *Insurance Act* by establishing a new "threshold" auto insurance system in Ontario.

Prior to the introduction of Bill 68, the government had obtained quotations from insurance companies for premiums that would be charged under the proposed threshold plan. The government had also retained actuaries to provide estimates of the cost of implementing different versions of its no-fault plan. Based on the information provided by these sources, the government announced that the implementation of the threshold plan contained in Bill 68 would result in an average premium increase of 8% for policyholders in urban areas, and no increases for policyholders in rural areas. According to the government, if the reforms proposed in Bill 68 were not implemented, insurance premiums would rise by an average of 30-35%.

Bill 68 was opposed by the Conservative Party and the NDP primarily on the grounds that most innocent accident victims would lose the right to sue under the new threshold plan.

Public hearings on the Bill were held in the winter of 1990. Following a lengthy filibuster by the NDP, Bill 68 came into effect on June 22, 1990.

Government Rationale for Bill 68

Due to the "runaway" costs of insurance over the previous decade and the excessive premium increases that resulted, the Ministry of Financial Institutions argued that it had three options in responding to these problems.⁴¹ First, it could legislate low premiums, resulting in mass withdrawal of companies from the market place and insufficient auto insurance availability. Although the government could step in with a public plan, it was argued that this would create massive disruption and dislocation in an industry employing 40,000 people. Moreover, a public company would eliminate the benefits to society of a competitive system, and would involve huge start-up costs.

The second option available to the government, according to the Ministry, was to continue with the existing system, and allow premiums to rise to ensure availability. The prospect of 30-35% premium increases, however, was deemed unacceptable.

The best option, it was argued, was to address the underlying causes of rising insurance premiums through comprehensive reforms. The Ministry noted that between 30 and 40 cents of every dollar awarded as compensation under the fault system went to legal fees and settlement costs. By restricting the right to sue, more money would be available for no-fault benefits, and premium levels could be stabilized. Bad driving would continue to be deterred under the new system by retaining the concept of fault for the purposes of assessing an individual driver's risk. Tougher penalties, better enforcement and driver education would also act to deter bad driving.

Compensation for Bodily Injury

As described previously, the fault system that existed in Ontario prior to Bill 68 permitted anyone to sue for damages resulting from injuries sustained in a motor vehicle accident, provided the person suing could establish that someone else was at fault. In addition, the fault system provided limited no-fault benefits to anyone injured in an accident, regardless of fault.

Under the threshold established by Bill 68,⁴² a person injured in a motor vehicle accident in Ontario (or that person's relatives, if the person dies) is entitled to sue for damages only if:

- (a) the injured person can prove that his or her injuries were caused by the fault of someone else; and
- (b) the injured person dies or sustains:
 - i) permanent serious disfigurement; or
 - ii) permanent serious impairment of an important bodily function caused by continuous injury which is physical in nature.

Part (b) above is the so-called threshold test an injured person must meet to be entitled to sue for damages. An innocent accident victim who meets the threshold requirements may sue for economic and non-economic loss, but must deduct from the claim the amount of any no-fault benefits received under the plan (described below).

No-Fault Benefits

An injured person who does not meet the threshold described above is not entitled to sue for damages, but is entitled to the no-fault benefits set out in a regulation to the *Insurance Act*.⁴³ Under section 268 of the Act, every motor vehicle liability policy must provide the no-fault benefits contained in the No-Fault Benefits Schedule. These benefits are, generally speaking, provided by one's own insurance company.

Under the existing No-Fault Benefits Schedule, anyone injured in a motor vehicle accident is entitled, regardless of fault, to the following benefits:

- *Supplementary Medical and Rehabilitation Benefits* — Every person who sustains physical, psychological or mental injury as a result of an accident is compensated for all reasonable expenses, up to a maximum of \$500,000. Benefits are payable for a period of 10 years, or 20 years less the age of the insured person on the date of the accident, whichever is longer.⁴⁴ An auto insurance company is not obliged to pay for an expense that is covered by any medical or hospitalization plan available to the insured.
- *Long Term Care Benefits* — Every person who sustains physical, psychological or mental injury as a result of an accident, and who requires long term care, is entitled to compensation for all reasonable expenses up to a total maximum of \$500,000, payable at a maximum rate of \$3,000 per month.⁴⁵
- *Death Benefits* — If an insured dies as a result of injuries sustained in an accident, an insurance company must pay:
 - \$25,000 to the spouse of the deceased;
 - \$25,000 (total) to the deceased's dependents, if the deceased is not survived by a spouse;
 - \$10,000 to each surviving dependent; and,
 - if the deceased was a dependent at the time of the accident, \$10,000 to the person upon whom the deceased was dependent.⁴⁶
- *Funeral Expenses* — If the insured dies, a maximum benefit of \$3,000 is payable.⁴⁷
- *Weekly Benefits (Income Replacement)* — Persons who were employed at the time of an accident and who miss work due to physical, psychological or mental injury sustained in the accident are entitled to the lesser of \$600 per week or 80% of the person's gross weekly income. Any payments received for loss of income from an income continuation plan, or "under the laws of any jurisdiction" (except Unemployment Insurance Benefits) are deducted from the income replacement benefits payable by the auto insurance company. Income replacement benefits are payable for up to 156 weeks, unless the insured suffers from a continuous injury that prevents a return to work. Unemployed persons (including students, retirees and unpaid homemakers) who are at least 16 at the time of the accident, are entitled to a weekly benefit of \$185. Weekly benefits are not payable to drivers who, as a result of the accident, are convicted of impaired driving or driving an uninsured vehicle, or who, at the time of the accident, were not licensed to drive, were "excluded

drivers" under the insurance policy, or were operating the vehicle without the owner's consent.⁴⁸

Property Damage

Under Bill 68, an insured is entitled to compensation from his or her own insurance company for loss or damage to the insured vehicle.⁴⁹ However, an insured will only be entitled to compensation to the extent he or she was not responsible for the loss or damage. For example, if the insured is 75% at fault, he or she will only receive compensation for 25% of the loss or damage to the vehicle. Vehicle owners can purchase full collision coverage in addition to the no-fault coverage.

Alternative Dispute Resolution

Bill 68 established a new alternative dispute resolution mechanism with respect to the payment of no-fault benefits. Under this mechanism, an insured or an insurance company may refer any dispute over an insured's entitlement to no-fault benefits or the amount of such benefits to a mediator.⁵⁰ If mediation fails, the insured (but not the insurance company) may either refer the dispute to arbitration or begin a court action.⁵¹

Ontario Insurance Commission

Bill 68 established the Ontario Insurance Commission to replace the office of the Superintendent of Insurance as the regulator of the insurance industry in Ontario. The Commission was given power to approve applications by insurance companies with respect to the classes of risk exposure used to determine the rates for each category of auto insurance, and to approve those rates.⁵² If the Commission does not approve an application, it must hold a public hearing.⁵³

In addition, Bill 68 attempted to strengthen the overall regulatory system by giving the Commission authority to collect information from insurance companies through annual

and interim returns, to make specific inquiries into the affairs of insurance companies and to issue compliance orders.

Corporations Tax Act Amendment

The *Corporations Tax Act* was amended by Bill 68 to exempt insurance policies for private passenger automobiles from a 3% tax imposed under that Act.

OHIP Payments

Prior to Bill 68, OHIP received annual payments from insurance companies to assist in the payment of health care costs associated with persons injured in motor vehicle accidents. Bill 68 amended the *Health Insurance Act* by eliminating these payments from insurance companies.

Response to Bill 68

Public hearings on Bill 68 were held by the Standing Committee on General Government in February, 1990. The following summaries of positions taken by the major interest groups affected by the Bill are based on the submissions made by those groups to the Committee.

The Insurance Industry

The insurance industry expressed general approval of Bill 68. For example, the brief submitted to the Committee by the Insurance Bureau of Canada concluded that "a combination of no-fault and tort is a good compromise in terms of reduced cost, expeditious delivery of benefits, and equity. Bill 68 is a good effort to balance all of the competing interests to reach a workable compromise."⁵⁴ Bill 68 was described as a compromise in that the insurance industry would have preferred a pure no-fault system in which the right to sue was completely eliminated.

Legal Community

The Ontario litigation bar has traditionally opposed the concept of no-fault auto insurance. Briefs submitted by the Canadian Bar Association (Ontario),⁵⁵ the Advocates Society,⁵⁶ and the lawyer-led group Fair Action in Insurance Reform,⁵⁷ raised a number of objections to Bill 68. For example, it was predicted by these groups that any reduction in premium rates resulting from Bill 68 would be one-time only. Thereafter, rates would continue to rise as they had previously.

Citing the Osborne Report, legal groups argued that any reduction in costs under threshold no-fault would stem primarily from a reduction in the benefits paid to innocent accident victims. It was estimated by these groups that there would be a 60% reduction in the amount of compensation paid out under the new plan, which would produce savings of \$480 million for the insurance industry. It was also estimated that the removal of the premium tax on insurance premiums and the annual contribution to OHIP would result in a windfall of \$140 million per year for the insurance industry.

Legal groups criticized the threshold as too restrictive, since it would eliminate access to the courts for an estimated 90% of all innocent accident victims. Moreover, it was pointed out that the proposed threshold would be the only threshold in North America that did not retain the right to sue for economic loss for all innocent accident victims.

The threshold was also criticized for being vague. The written description of the threshold, it was argued, was loaded with words that would require years of litigation to define, resulting in an inefficient system of compensation.

Another concern raised by lawyers was that no-fault systems do not allow for individualized compensation, since everyone receives the same benefits, regardless of how an injury affects the individual.

Lawyers also predicted that there would be an increase in accident frequency in Ontario under threshold no-fault, since the deterrent effect on bad driving produced by the threat of a civil law suit would be largely removed.

Finally, the legal community argued that the concept of no-fault offends principles of natural justice by treating the "guilty" the same as the "innocent."

The Disabled

Organizations representing various disabled groups were unanimous in branding the threshold as discriminatory, because it excluded from the right to sue those persons whose injuries were not physical in nature. The Canadian Mental Health Association (Ontario), for example, stated:

Just because some persons may be more vulnerable than others to becoming seriously and permanently mentally and psychologically disabled does not mean that they should receive any less fair and equitable treatment under the law than someone who is seriously and permanently physically injured. To do otherwise is to clearly discriminate against the mentally and psychologically disabled.⁵⁸

It was also pointed out that the exclusion from the threshold of psychological injuries was inconsistent with Bill 68's provision of no-fault benefits to persons who sustain either physical or psychological injuries.

Unions

The Ontario Federation of Labour and a number of unions⁵⁹ took the position that the income replacement benefits should be first loss insurance; that is, these benefits should be payable by the auto insurance company, before payments are made by any work-related income continuation or sick leave plans. The effect of the government's proposed scheme, it was argued, would be to transfer the cost of auto insurance to work-related plans.

Unions also recommended that the proposed maximum of \$450 per week for the income replacement benefit be increased and indexed to inflation. (In fact, the final version of Bill 68 increased the maximum weekly benefit to \$600; however, no-fault benefits were not indexed.)

Consumers' Association of Canada

The Consumers' Association of Canada expressed its support for a publicly run no-fault compensation system. With respect to the particular features of Bill 68, the Association felt that the threshold was too uncertain and should be replaced with a pure no-fault plan. The group also recommended that the no-fault benefits be first-loss insurance and that the benefits be indexed.⁶⁰

Small Business

Representatives of small business⁶¹ were concerned that Bill 68 did not provide adequate compensation for independent entrepreneurs. For example, it was argued that if the owner of a small business was an innocent motor vehicle accident victim and was injured to the extent that he or she could not run the business, but the injuries did not meet the threshold, the business could fail, and the owner would only be entitled to no-fault benefits. Under the fault system, it was noted, the business owner could have sued for the loss of his or her business.

The Effect of Bill 68

Since Bill 68 has only been in effect for a year and a half, it is difficult to say what its long term effects will be. The following statistics are intended to give only a preliminary indication of how the new threshold no-fault plan has been working.

Number of Accidents

Critics of no-fault predicted that accident rates would increase under the threshold system, since the deterrent effect of civil lawsuits would be almost completely eliminated. The following accident statistics were provided by the Ontario Ministry of Transportation.⁶² Statistics for 1991 are not yet available.

YEAR	Total Number of Accidents	Accident Rate per 1 million kilometres travelled	Fatal Accident Rate per 100 kilometres travelled
1990	203,431	3.00	1.30
1989	247,038	3.21	1.44
1988	228,398	3.15	1.49
1987	203,431	2.84	1.51
1986	—	2.74	1.39
1955	—	3.4	5.2

The Ministry attributes the decline in the fatal accident rate to a decline in the number of people who drink and drive, greater use of seatbelts, the effect of the economic recession on the number of kilometres travelled, and better law enforcement.

Premium Rates

Some critics of Bill 68 predicted that the threshold no-fault plan might initially stabilize premium rates, but that rates would soon continue to rise as they had previously. The following statistics for average earned premiums were provided by the Insurance Bureau of Canada.⁶³

YEAR	Average Earned Premium per Vehicle (all Ontario)	Average Earned Premium per Vehicle (Metro Toronto)
1991	\$806.44	\$1,014.67
1990	\$788.50	\$973.31
1989	\$720.11	\$874.46
1988	\$654.60	\$787.59
1987	\$621.15	\$740.76

Insurance Industry Profitability

A number of groups suggested that the combined effect of denying access to the courts for innocent accident victims, and the elimination of the 3% premium tax and the OHIP contribution, would produce huge profits for the insurance industry. The following statistics were provided by the Insurance Bureau of Canada.⁶⁴

YEAR	Ontario Auto Insurance Companies Net Pretax Income (million \$)
1992 (first 6 months)	291
1991	705
1990	251
1989	283 (loss)
1988	396 (loss)
1987	138 (loss)
1986	327 (loss)

Pretax income figures are estimates based on a survey of member companies conducted by the Insurance Bureau of Canada.

YEAR	Loss Ratio (all coverages for private passenger vehicles) ⁶⁵
1991	76
1990	83
1989	103
1988	105
1987	96

Loss ratios show how much of every dollar received by an insurance company in premiums is paid out in claims. For example, a loss ratio of 76 means that for every dollar received in premiums by an insurance company, 76 cents is paid out to satisfy claims made against the company.

Alternative Dispute Resolution

Some lawyers argued that the proposed first party system under Bill 68, whereby most injured persons would collect no-fault benefits directly from their own insurance companies, would not produce speedier compensation for accident victims. Rather, compensation would be delayed, due to the difficulty insured people have traditionally had when dealing directly with insurance companies (as opposed to dealing with companies through a lawyer). Moreover, it was predicted that the bureaucracy needed to run the proposed alternative dispute resolution system would be inefficient.

The following figures provided by the Ontario Insurance Commission, the body responsible for the alternative dispute resolution system, indicate the number of claims that have been made for no-fault benefits under Bill 68 that have gone to alternative dispute resolution, and the number of cases that have been processed.⁶⁶

YEAR	Number of mediations	Number of mediations closed	Number of mediations referred to arbitration	Number of arbitrations closed	Number of appeals to Executive Director Arbitrations
1991-92	1483	1171	101	47	13
1990-91	189	—	4	0	0

Litigation

Opponents of Bill 68 believed that the "vague" wording of the threshold could create a substantial amount of litigation, which would negate any administrative efficiencies gained through a first party system. To date, there have been two court decisions interpreting the threshold wording. In *Meyer v. Bright*, the Ontario Court (General Division) held that plaintiffs must sustain near "catastrophic" injuries to meet the threshold, and thus be entitled to sue for damages.⁶⁷ The court in *Myer* also held that to meet the threshold, an injury must be both permanent and serious, and that a plaintiff will only be compensated for those injuries that meet the threshold (i.e., not for lesser injuries). The *Meyer* decision is currently under appeal.

It should also be noted that comments made at a recent conference by a panel of Ontario judges suggest that, in the future, Ontario courts might give a more liberal interpretation to the threshold than was given by the court in *Meyer*.⁶⁸

In fact, the most recent decision of the Ontario court (General Division) appears to reflect the comments made by the panel of judges. In *Dalgliesh v. Green* the court ruled in a pre-trial motion that the "near catastrophic" test established in *Meyer* should be replaced with the dictionary definition of "serious." While the litigation bar in Ontario has been encouraged by this liberal interpretation of the threshold, lawyers note that it is still up to the court that actually hears the case at trial to determine whether the plaintiff in *Dalgliesh* meets the threshold test.⁶⁹

One constitutional challenge has been made to the threshold established under Bill 68. Lawyers for the plaintiff in *Hernandez v. Palmer* argued in a pre-trial motion that the threshold violates section 7 (right to life, liberty and security of person) and section 15 (equality rights) of the *Canadian Charter of Rights and Freedoms*.⁷⁰ The Ontario Court (General Division) held that the threshold does not violate the Charter. In particular, the court stated that section 7 of the Charter does not protect the right to sue for damages. In this respect, the court referred to the Supreme Court of Canada's decision in *Reference Re Workers' Compensation Act, 1983*,⁷¹ where the Supreme Court held that legislation restricting the right to sue in return for workers' compensation benefits was constitutionally valid.

Further, the court in *Hernandez* noted that the no-fault system did not simply take away benefits, but added new ones:

When compared with the common law tort system, which leaves some accident victims without any compensation, the no-fault system appears to provide prompt and comprehensive compensation to all individuals, thereby furthering the values of liberty and security of the person guaranteed by the Charter s. 7 . . .⁷²

Finally, with respect to section 7 of the Charter, the court found that the extent of an injured person's right to sue for damages was a matter of public policy which "falls within the exclusive domain of Ontario's elected representatives."⁷³

In holding that the threshold does not violate the equality rights contained in section 15 of the Charter, the court found that the no-fault plan did not create a disadvantage for accident victims, since the plan, "does not deprive individual rights but exchanges [the existing] . . . right of action with a right to comprehensive no-fault benefits."⁷⁴

The plaintiff's lawyer in *Hernandez* has stated that the case will be appealed.⁷⁵

BILL 164**Introduction**

Bill 164⁷⁶ was introduced in December 1991 and received second reading on October 13, 1992. The Bill proposes to enhance the no-fault benefits established under Bill 68, eliminate the right to sue for economic loss, and restore the right to sue for non-economic loss, subject to a deductible amount.

Government Rationale for Bill 164

In a background document to Bill 164, entitled "The Road Ahead", the government outlined the following reasons for reforming the system established by Bill 68:⁷⁷

- Inadequate accident benefits - Benefits are currently not indexed for inflation; the long term care and rehabilitation benefits are limited in terms of amount and the time for which they are available; existing benefits do not recognize the special circumstances of such individuals as students or those who are temporarily unemployed.
- Restricted right to sue for pain and suffering - Under the existing threshold system, too many accident victims, including those who sustain psychological injuries, are prevented from recovering compensation for pain and suffering through the courts.
- Higher profits in the insurance industry - Although Bill 68 created substantial savings for insurance companies, there is little indication that these savings have been passed along to the consumer.
- Confused consumers - Consumers are confused by the lack of consistency in the way the insurance industry conducts business. Insurance companies use different factors to classify drivers, and information on these classification plans is difficult to obtain. Claims are taking too long to settle and injured persons are struggling to assert their rights to compensation when dealing with insurance companies.
- Residual market - In an effort to keep costs down, insurance companies prefer to write policies only for low-risk drivers, thus leaving many drivers with good driving records no option but to buy expensive insurance from the residual insurance market (the Facility Association). Too many drivers have had to opt for this insurance of last resort.

- Safety - The current system does not provide enough incentives for insurance companies to invest in safety programs.

In June 1992, the government obtained an actuarial costing of Bill 164 from William Mercer Limited.⁷⁸ The consultant's report reached the following conclusions:

- 18.1% of injured persons who are not at fault will be able to sue for non-economic loss under Bill 164, compared with 5.8% under Bill 68.
- The total cost of benefits payable to injured persons under Bill 164 is estimated to be 13% greater than under Bill 68.
- The proportion of injured persons who were eligible for income benefits under the pre-Bill 68 system was 62%. Under Bill 68 this figure was 91%, and under Bill 164 the figure is estimated to be 98%.
- Based on certain global assumptions about expenses, profit margins, etc., the premium pertaining to a single typical automobile insured for one year under the pre-Bill 68 system would have been \$1,064. Under Bill 68 the premium would be \$829, and under Bill 164 the premium is estimated to be \$862.

No-Fault Benefits (Statutory Accident Benefits)

Under Bill 164, the present "No-Fault Benefits Schedule" would be retitled "Statutory Accident Benefits Schedule", to make clear that these benefits are statutorily required, and are not simply benefits provided by insurance companies under an insurance contract.⁷⁹

Section 25 of the Bill provides that the Statutory Accident Benefits Schedule must include income replacement benefits and loss of earning capacity benefits, caregiver benefits, disability benefits for persons not entitled to income replacement benefits, supplementary medical and rehabilitation benefits, attendant care benefits, death and funeral benefits, and "other benefits" to compensate for pecuniary losses.

Future regulations amending the Schedule will not be permitted to reduce any of the maximum or minimum monetary limits established by the Schedule for income replacement or loss of earning capacity benefits.

Section 25 of the Bill will also entrench in the Schedule a requirement that insurance companies must pay, as a component of rehabilitation benefits, the cost of any reasonable measures aimed at reducing or eliminating the effect of a disability resulting from an injury, and the cost of facilitating an injured person's reintegration into his or her family, the labour market and the rest of society.

Under section 25 of the Bill, the maximum and minimum monetary limits established under the Schedule for income replacement and loss of earning capacity benefits, as well as any continuing periodic payments made in respect of these benefits, will be indexed for inflation. Further, indexation cannot reduce the amount of a continuing periodic payment.

The following is an outline of the specific benefits to be provided under Bill 164, as set out in a draft regulation released by the Ministry of Financial Institutions.⁸⁰ A comparison of the benefits currently provided as a result of Bill 68 and those proposed under Bill 164 is contained in a chart in the appendix to this paper.

Income Replacement Benefits

Income replacement benefits are provided under Part II of the draft regulation to persons who are employed or unemployed at the time of an accident. Section 6 requires insurance companies to pay a weekly income replacement benefit to every insured person who:

- sustains a physical, psychological or mental injury as a result of an accident;
- was employed at the time of the accident;
- was unemployed at the time of the accident, but had worked at some point during the 156 weeks before the accident;
- was on strike from or was locked out from an employment at the time of the accident or was laid off and was entitled to be recalled under a collective agreement; and

- has received weekly caregivers' benefits or weekly income replacement benefits and had intended to return to the employment in which the person had been engaged prior to becoming a caregiver.

The injured person may choose to have his or her income replacement benefits based on the average weekly income earned in the 4, 52, or 156 weeks before the accident. After one year, persons receiving income replacement benefits may have their benefits adjusted by taking out periods of unemployment from the 52 or 156 weeks prior to the accident, or alternatively may have the benefit based on any six month period in the 42 months prior to the accident.

The weekly income replacement benefit is payable for the period that the insured person suffers substantial inability to perform the essential tasks of employment. The basic weekly income replacement benefit is 90% of the insured person's net weekly income from employment. Net weekly income is calculated according to the formula set out in section 61 of the draft regulation. The minimum amount of the weekly benefit is \$185, and the maximum is \$1,000.⁸¹

The proposed income replacement benefits will not be first loss insurance, since auto insurance companies will be able to deduct from the weekly benefit:

- Net payments for loss of income that have been received by the insured person as a result of the accident under the laws of any jurisdiction (e.g., Canada Pension Plan payments) or under any income continuation plan.
- Net payments for loss of income that have not been received by the insured person but are available to the insured person as a result of the accident under the laws of any jurisdiction or under any income continuation plan, unless the insured person has applied to receive the payments for loss of income.

No deductions will be made for:

- Unemployment Insurance benefits that have been received by or are available to the insured person; or
- payments under a sick-leave plan that have not been received by the insured person but are available to the insured person.

The government estimates that the \$1000 per week benefit will cover more than 90% of income earners in Ontario, up from the current 75%.⁸²

Sections 14 and 15 provide weekly income replacement benefits for unemployed persons. The amount of this benefit is \$185 per week for six months, then 90% of net income if the person had worked within the three years prior to the accident.

Education Disability Benefits

A weekly education disability benefit of \$185 is provided under Part III of the draft regulation to persons who sustain a physical, psychological or mental injury as a result of an accident and who:

- were less than 16 years old at the time of the accident;
- were enrolled in an elementary, secondary or post-secondary school at the time of the accident; or
- had completed their education within the six months prior to the accident and were not employed at the time of the accident.⁸³

The benefit is payable for as long as the person is substantially unable to continue his or her education or employment, or for as long as the person suffers a substantial change in his or her ability to participate in one or more of the daily activities the person regularly engaged in prior to the accident. In addition, a yearly educational disability benefit of \$2,000 is payable to students for each year of elementary education missed as a result of an accident. A benefit of up to \$4,000 per year is payable to secondary school students for each year of school missed, and a benefit of up to \$8,000 per year is provided for post-secondary students.⁸⁴

Loss of Earning Capacity Benefits

Part VI of the draft regulation requires insurance companies to notify an insured person that weekly loss of earning capacity benefits are available where the insured

person continues to receive weekly income replacement benefits or weekly education disability benefits for more than 104 weeks.⁸⁵

If the insured reaches an agreement with the insurance company, the loss of earning capacity benefits would be payable instead of the weekly income replacement benefits. Loss of earning capacity benefits are calculated in accordance with the formula set out in section 26 of the draft regulation. If no agreement is reached, the insured will be entitled to an assessment of his or her loss of earning capacity by an assessment panel.⁸⁶

The maximum amount of the loss of earning capacity benefits is \$1,000 per week.⁸⁷

Insurance companies will be able to make the same deduction from loss of earning capacity benefits that they can make when calculating income replacement benefits.

The amount of the weekly loss of earning capacity benefit is subject to mandatory review three years after the benefits are first paid, and then eight years after they are first paid.⁸⁸ Whenever there is a deterioration in the condition of the insured, the insured may request a review.⁸⁹

Caregiver Benefits

Under Part IV of the draft regulation insurance companies will be required to pay a weekly benefit of \$250 to any insured who, at the time of the accident, was not employed on a full-time basis and who was living with a person for whom the insured person was the primary caregiver.⁹⁰

Supplementary Medical Benefits and Rehabilitation Benefits

Under Part VII of the draft regulation, every insured person who sustains physical, psychological or mental injury as a result of an accident will be entitled to unlimited coverage for all reasonable medical expenses resulting from the accident, including

medical, psychological, surgical, dental, optometric, hospital, chiropractic, nursing, ambulance and physiotherapy services.⁹¹

Similarly, insured persons will be entitled under Part VIII to unlimited rehabilitation benefits, including payments for all reasonable measures to reduce or eliminate the effects of any disability resulting from an injury, and to facilitate the insured person's reintegration into his or her family, the labour market and the rest of society.⁹² An insurance company is not required to pay the portion of any expense that is covered by another insurance plan or law.⁹³

Attendant Care Benefits (Long-Term Care Benefits)

Insurance companies will be required under Part IX of the draft regulation to pay for the cost of services provided by a qualified caregiver to an insured person injured in an accident, as well as all reasonable expenses for providing care to the insured as a result of the accident. The total amount of this benefit is unlimited, although there is a monthly payment limit of \$3,000. The benefit is also subject to deductions for amounts payable under other insurance plans or laws.⁹⁴

Death Benefits

If an insured dies as a result of an accident, a surviving spouse will be entitled to a death benefit, as follows:

- if the insured person was employed or recently unemployed at the time of the accident, the surviving spouse will receive an amount equal to the insured person's net weekly income multiplied by 187.2; or
- if the insured did not meet the above qualifications, the surviving spouse receives \$50,000.⁹⁵

The minimum amount of the above benefits is \$50,000, and the maximum is \$200,000.⁹⁶

If there is no surviving spouse, any surviving dependents of the insured will receive (in equal shares) the amount of the benefit that would have been payable to the surviving spouse.⁹⁷

Where there is a surviving spouse and dependents, the spouse receives the benefits noted above, and each dependent will receive a benefit of \$10,000.⁹⁸

Funeral Benefits

Insurance companies must pay the funeral expenses incurred in respect of an insured person who dies as a result of an accident, up to a maximum of \$6,000.⁹⁹

Other Economic Losses

The draft regulation also includes benefits for: expenses incurred by persons visiting the insured;¹⁰⁰ expenses incurred for the caring of an insured's dependents;¹⁰¹ housekeeping and home maintenance expenses;¹⁰² and damage to clothing and other personal effects.¹⁰³

Exclusions

Insurance companies will not be required to pay income replacement benefits, education disability benefits, or loss of earning capacity benefits to a person who was driving a vehicle at the time of an accident and who:

- is convicted of impaired driving;
- is convicted for failure to provide a breath sample;
- is convicted for driving an uninsured vehicle;
- is not licensed to drive;
- is an excluded driver under the insurance policy; or
- was operating the vehicle without the owner's consent.

In addition, benefits will not be payable to the occupants of a car who knew the car was being driven without the owner's consent, or to insured persons who made misrepresentations to their insurance companies.¹⁰⁴

Indexation

Part XVII of the draft regulation provides that the weekly income replacement benefits, loss of earning capacity benefits, education disability benefits, and caregiver benefits are to be adjusted each year to account for inflation.¹⁰⁵ A continuing periodic payment cannot be reduced in years of deflation.¹⁰⁶

In addition, the specific monetary amounts referred to in the draft regulation (with some exceptions) are to be indexed to inflation.¹⁰⁷

Workers' Compensation

The draft regulation provides that an insurance company is not required to pay the Statutory Accident Benefits to a person who is entitled to receive workers' compensation benefits as a result of an accident.¹⁰⁸

Right to Sue

Bill 164 provides that the threshold established under Bill 68 will not apply to accidents occurring after Bill 164 comes into effect. After Bill 164 becomes law, all innocent accident victims will have a right to sue for non-economic loss (pain and suffering, loss of amenities of life and loss of expectation of life, and loss of guidance, care and companionship under the *Family Law Act*). However, any damages awarded for non-economic loss, other than loss of care, guidance and companionship, will be subject to a deductible of \$15,000. Damages awarded for loss of care, guidance and companionship will be subject to a \$5,000 reduction. The \$15,000 and \$5,000 deductibles will be indexed to inflation.¹⁰⁹

Other Amendments

Other important amendments proposed under Bill 164 to the existing auto insurance system include:

- extending the existing power of the Superintendent of Insurance to assume control of an insurance company's assets to include the power to seize assets where the status of the company is such that it may be prejudicial to the interests of that company's policyholders;¹¹⁵
- requiring insurance companies to give 180 days notice before withdrawing from the field of auto insurance;¹¹⁶ and
- increasing the regulatory authority of the Commissioner of Insurance over the activities of the Facility Association (residual auto insurance market) through amendments to the *Compulsory Automobile Insurance Act*.¹¹⁷

Reaction to Bill 164

Initial reaction to Bill 164 by the insurance industry was negative. Two actuarial studies commissioned by the industry predicted that the costs of implementing the Bill would be significantly higher than those estimated by the government. The findings of these reports are outlined below.

Public hearings on Bill 164 were held by the Standing Committee on Finance and Economic Affairs during the last week in January and the first week in February, 1993. The recommendations of groups and individuals appearing before the Committee are also highlighted below.

Actuarial Studies

Following the introduction of Bill 164, the State Farm Insurance Company commissioned a study of the Bill by the Coopers and Lybrand Consulting Group. The consultant's report¹¹⁸, released in October 1992, was highly critical of Bill 164. Specifically, the report predicted that:

The effect of Bill 164 on the right to sue is that all innocent accident victims will be entitled to sue for non-economic loss, subject to the deductible amounts. No one injured in an accident will be able to sue for economic loss (Under Bill 68, innocent accident victims who met the threshold were able to sue for all economic and non-economic losses).

The government estimates that the new right-to-sue provisions will provide access to the courts for 15,000 accident victims per year, up from the current 5,000 per year.¹¹⁰

Insurance Risk Classification and Rate Determination

Bill 164 proposes to give the Lieutenant Governor in Council (Cabinet) the power to make regulations prescribing the risk classifications that must be used by insurance companies in classifying automobile insurance risks and the rating factors to be used in determining premium rates.¹¹¹ In addition, the Bill would prohibit insurance companies from increasing or decreasing the rates charged for a class of risks by more than a prescribed percentage or maximum amount. Any increases beyond the prescribed amounts would have to be approved by the Commissioner of Insurance.¹¹²

In *The Road Ahead*, the background document to Bill 164, the government states that the current use of classification variables relating to age, sex and marital status are "discriminatory", since they are variables "based on characteristics beyond the control of the vehicle owner". As such, these variables are "inappropriate in a modern insurance system".¹¹³

With the powers given to it under Bill 164, the government intends to establish a classification plan that is uniform and non-discriminatory. The new plan will emphasize an individual's driving record and experience. To minimize disruption to consumers, the government proposes to have the new plan in effect "at a time and in a way that minimizes rate pressures".¹¹⁴

- Current premium levels are too low to cover the costs of insurance companies. In order to implement Bill 164 and, at the same time, bring premiums into line with costs, premiums will have to rise by up to \$200.

Withdrawal from the Market

Just prior to the commencement of public hearings on Bill 164, the government announced that a number of amendments would be made to the Bill. The most significant amendment concerns the provisions governing the withdrawal of insurance companies from the market. Under the original provisions of the Bill, any insurance company (except life insurance, and accident and sickness insurance companies) intending to withdraw from the market would have been required to file notice with the Commissioner of Insurance, and could only withdraw if the commissioner was satisfied that:

- the insurer's withdrawal would not result in a significant number of people having difficulty obtaining the type of insurance that was sold by the withdrawing company;
- the insurer's solvency would be seriously impaired if it did not withdraw from the market; or
- it would be in the public interest for the insurer to withdraw from the market.

In addition, the original provisions would have prohibited any insurance company that had withdrawn from the market from re-entering for a period of three years.

Under the proposed amendments to the Bill, insurance companies intending to withdraw from the market will only be required to give the Commissioner of Insurance 180 days notice. The new provisions would only apply to auto insurers, and the Commissioner of Insurance will not be authorized to prevent a company from withdrawing from the market.

These amendments received the general support of insurance representatives appearing before the Committee, although some groups felt that any regulation of market entry and withdrawal by insurance companies is unnecessary.¹²⁰

- The proposed risk classification system will force women in all age categories to pay significantly higher premiums.
- Seniors and mature drivers will subsidize the lower rates required to be given young and high-risk drivers under the new classification system.
- Increased access to the court system for non-economic loss will significantly raise the cost of auto insurance. Claims could rise up to 20%, or \$565 million a year. The rise in claims costs would produce losses of \$478 million.
- Increased costs resulting from standardized rates, rate controls, and protection of broker margins will lead to job cuts in the insurance industry of 10%, or 2,000 jobs. Some companies will be forced out of business.
- Up to \$2.3 billion in capital withdrawals from the industry could occur due to the stringent industry controls proposed by the Bill.
- It will be difficult for mutual insurance companies owned by their policy holders to build on their capital base, since Bill 164 proposes to impose rate caps and does not specifically recognize the principle of a fair rate of return on capital.

The report concludes that Bill 164 should be amended by removing the following provisions:

- the provisions regarding risk reclassification;
- the right to sue for non-economic loss;
- the business withdrawal provisions; and
- rate-making provisions that do not specifically recognize the normal cost of capital.

A study released by the Insurance Bureau of Canada in January 1993, also disputes the government's figures relating to Bill 164.¹¹⁹ The study, conducted for the Insurance Bureau by the Wyatt Company, concluded that:

- The Ontario government's projections that Bill 164 will result in premium increases of \$30 - \$40 per year are too low.
- In order to implement Bill 164, premiums will have to rise 19%, resulting in increases of between \$150 and \$170 for the average motorist.

Right to Sue

The insurance industry representatives appearing before the Committee generally favoured retaining the existing right-to-sue provisions. Bill 68's threshold system, it was argued, has proven to be effective in stabilizing costs and premium rates, and has allowed the auto insurance industry to make reasonable profits. The insurance industry warned that the Bill's proposal to increase access to the courts for those wishing to bring claims for non-economic loss would increase claims costs for insurance companies, since all personal injury cases would have to be investigated to determine fault. Increased claims costs would, in turn, produce higher premiums for consumers.

It was also argued by the insurance industry that the elimination of the right to sue for economic loss, as proposed by Bill 164, would make courts reconsider the cap on damages that can be awarded for non-economic loss set by the Supreme Court of Canada in a series of 1978 cases. Since the cap was imposed at a time when accident victims had the right to sue for all economic loss, it was suggested that the removal of the right to sue for economic loss will make courts less inclined to limit damages that can be awarded for non-economic loss.

Accordingly, the insurance industry recommended that, if the government intends to proceed with the proposed right-to-sue provisions, a cap should be established, by legislation, on the amount that can be claimed for non-economic loss.¹²¹

Legal groups appearing before the Committee felt that the proposed deductible of \$15,000 on damages for pain and suffering was too high. In the view of these groups, the proposed right to sue for non-economic loss will exclude more accident victims from the courts than the government has estimated, since insurance companies will choose to fight claims in the \$20,000 to \$25,000 range, arguing that they are worth only \$15,000. Moreover, a deductible of \$15,000 would exclude accident victims who sustain serious injuries, including fractures and nerve damage.

Therefore, legal groups recommended that the deductible amount be reduced to \$7,500.¹²²

Risk Classification System

Insurance industry representatives generally opposed the government's proposal to eliminate age, sex and marital status as rating factors, arguing this would result in low risk drivers, such as seniors and women, subsidizing high risk drivers, such as young males.¹²³

Income Replacement Benefits

A common complaint about the proposed income replacement benefits was that, in basing these benefits on 90 percent of net income, up to a maximum of \$1,000 per week, instead of the current 80 percent of gross income, up to a maximum of \$600 per week, some low and middle income earners would actually be receiving less under Bill 164 than they would under the existing plan.

It was also pointed out that by increasing the maximum weekly benefit from \$600 to \$1,000, low and middle income earners would be paying insurance premiums at levels that would allow high income earners to be compensated for their income losses.

Another concern about the income replacement benefits was that the benefits are based on the income of the person at the time of the accident, and do not provide compensation for potential increases in future income that workers could have expected had their careers progressed.¹²⁴

Education Disability Benefits

The main criticism of this benefit was that it made little provision for the years of lost income a student might have received had the student graduated from school and advanced through a particular career.¹²⁵

Other Disability Benefits

It was pointed out to the Committee that many of the accident victims covered by this \$185 per week, non-indexed benefit would be seniors. Seniors, it was argued, should not have to pay premiums that would allow high income earners to receive income replacement benefits of up to \$1,000 per week, indexed. One suggestion to redress this inequity was to give seniors premium discounts.¹²⁶

Medical and Rehabilitation Benefits

Recommendations to amend the medical and rehabilitation benefits provisions of the Draft Regulation focused on the proposed removal of the existing \$500,000 cap, and the need to regulate the provision of rehabilitation services.

Most insurance companies noted that claims for rehabilitation benefits are unpredictable, have long pay-out periods, and are susceptible to technological change. To lift the cap on such benefits would create unlimited exposure for insurance companies to catastrophic claims, making it difficult for companies to set appropriate reserves. One group suggested that an alternative to removing the cap would be to establish a catastrophic claims fund, to be operated by the insurance industry.¹²⁷

A number of groups recommended that standards be established for the provision of rehabilitation services in Ontario, especially in light of the proliferation of private rehabilitation services following the introduction of Bill 68's no-fault plan. One recommendation was to set standards similar to those established in Quebec.¹²⁸

Attendant Care Benefits

Although the Draft Regulation would remove the existing cap of \$500,000 on the total amount available for attendant care benefits (long-term care benefits), it proposes to retain the existing cap of \$3,000 per month. Several groups felt the monthly cap is too low. For example, one group pointed out that \$3,000 per month would only

cover six to eight hours of care per day in the current market. It was suggested that, in order to provide funding for more extensive daily care, auto insurance premiums could be reduced in other areas, such as property damage coverage, through higher deductibles and better control of repair costs. Alternatively, premiums could be increased for high income earners.¹²⁹

Other Issues

Other recommendations for amending Bill 164 included the following:

- Auto insurance should be first loss insurance (i.e., auto insurance should pay benefits before any work related income replacement or sick-leave plans), since those persons who have taken the precaution of providing for income replacement, or whose employer has provided for income continuation or sick-leave, should be entitled to receive the same benefits from their auto insurance policy as any other insurance consumer.¹³⁰
- The \$185 weekly benefit provided under "Other Disability Benefits" should be indexed for seniors and unemployed persons. Such persons should not be penalized for being outside the work force due to no fault of their own.¹³¹
- While the Draft Regulation contains provisions for rehabilitation counselling, financial counselling and employment counselling, it contains no provisions for legal counselling. Given the complexity of the proposed Statutory Accident Benefits scheme, accident victims should have access to legal counselling and should be reimbursed by insurance companies for such expenses.¹³²

ADVANTAGES AND DISADVANTAGES OF NO-FAULT

Bill 68 represented a fundamental change to the system of auto insurance compensation in Ontario because it eliminated the right to sue for all but the most seriously injured accident victims, and established a system where compensation is provided, to a large extent, without regard to fault. Some groups, most notably the legal profession, argued that the concept of no-fault runs contrary to a long-standing right to recover compensation through the courts from "wrongdoers". Moreover, it was argued, no-fault offends the principles of justice by providing the same compensation to "wrongdoers" as is provided to "innocent" accident victims.

Three of the major studies on auto insurance conducted prior to Bill 68 (Ontario Law Reform Commission, Select Committee on Company Law and the Ontario Task Force on Insurance) recommended a move toward no-fault; however the Osborne Report and the Ontario Automobile Insurance Board were critical of such plans.

While Bill 164 proposes to eliminate the threshold established under Bill 68, it preserves the principle of no-fault as the means of providing compensation to accident victims in Ontario. Those groups who opposed the no-fault concept during the debate over Bill 68 can be expected to express concern about the new no-fault system proposed under Bill 164.

The following is an outline of some of the arguments that have been made in favour of and against no-fault compensation plans.

Deterrence

Proponents of the fault system argue that the prospect of being sued deters people from driving in a careless way. According to this view, accident frequency will be higher under a no-fault system, since the deterrent effect of lawsuits has been removed.

This argument is answered by no-fault supporters who say that more effective deterrent mechanisms are already in place. It is said that, if a driver is undeterred by the threat of criminal sanctions imposed by the *Criminal Code* and *Highway Traffic Act*, has no regard for his or her own safety or the safety of others, and is unconcerned about potential property damage and higher insurance premiums, then it is unlikely such a person will be deterred from careless driving by the threat of a civil lawsuit, especially when the cost of the lawsuit will be absorbed by the driver's insurance company. In these circumstances, it is argued, the concept of deterrence and personal responsibility are meaningless in a fault system.

Cost

In theory, no-fault plans are less costly to operate than fault-based plans, since the costs of determining fault have been eliminated, leaving a greater portion of every premium dollar to be paid out in the form of benefits.

The Ontario Task Force on Insurance projected that 80-90% of premiums under a pure no-fault plan would be available for benefits, an improvement of 30-40% over the fault system in effect in Ontario before Bill 68.¹³³

The Osborne Report rejected the Task Force's figures, but concluded there would be modestly reduced costs under a threshold or pure no-fault plan, due primarily to the elimination of legal defence costs for insurance companies.¹³⁴

The Ontario Automobile Insurance Board concluded that any cost savings associated with no-fault plans would come almost entirely from a reduction in benefits payable to injured claimants, and not from any increase in efficiency.¹³⁵

Premium Rates

It is also argued that the elimination of fault-determination costs under no-fault plans allows insurance companies to keep premium rates low.

Opponents of no-fault say that any such savings are offset by payments to those who would not have qualified for compensation under the fault system and by the higher levels of no-fault benefits provided under no-fault plans.

Compensation

A number of studies have shown that more than half of all accident victims went without compensation under the fault system, due to the fact that some victims could not establish the fault of another, or were themselves at fault. Proponents of no-fault

Fairness

Those who favour retention of the right to sue argue it is unfair to provide the same level of compensation to a person who caused an accident (e.g., the drunk driver) as is provided to the "innocent" party. Justice Osborne, for example, commented:

The moral values implicit in tort law, seem to me to be both understood and agreed to by a substantial majority of drivers who may not know what tort means, or what tort law is, but who do appreciate what it stands for. As related to motor vehicle accidents, the public understands and accepts the rules of the road. The concept of some individual responsibility for individual actions, at least in a humanely modified form, is central to what reasonable people regard as just.¹³⁷

Supporters of no-fault counter that automobile accidents are often caused by a number of factors beyond the control of a driver, such as weather and road conditions. In this respect, personal injury and property damage are simply the inevitable result of operating motor vehicles. So-called "at-fault" parties should not be denied compensation due to mistakes which anyone can make.

PUBLIC VERSUS PRIVATE ADMINISTRATION

Four provinces in Canada (Quebec, Manitoba, Saskatchewan and British Columbia) currently have publicly-administered auto insurance plans. The compulsory portion of auto insurance in the three western provinces is provided by government monopolies. Private insurers are permitted to compete with the government in the provision of supplementary coverage. In Quebec a public corporation has exclusive rights in the area of bodily injury compensation. Vehicle damage insurance is provided by the private sector.

Since these public plans are well established, comparisons are often made with Ontario's privately run system. However, due to territorial differences, statistical

believe most people would prefer a no-fault system that guarantees a certain level of compensation for economic loss for all accident victims, instead of the fault system which, due to its inherent uncertainties, might or might not provide full compensation for economic and non-economic loss to innocent accident victims only.

Delay

Critics of the fault system point out that, even when compensation was provided, it was often delayed by the time needed to investigate and determine fault, and by the need to assess the full extent of an injured person's injuries before compensation could be paid. The problem of delay was described by the Ontario Law Reform Commission:

Fatal accident cases aside, the rule seems to be that the more serious the injury the longer the delay before compensation. This, too, is rationally explicable. The larger the claim against a defendant, the more inclined he is to dispute liability, whether he be an individual or a liability insurer. Even if one expects ultimately to lose, or to lose something, there can be a considerable advantage to postponing the payment of compensation (albeit this may have a detrimental effect on the injured victim). The loss might be reduced by prompt payment. The amount paid by the defendant to settle the claim may be much more dramatically diminished by delaying settlement. The more serious the injury, the more pressing the victim's need for cash is apt to be, and consequently the readier he may be to accept less now rather than more in the future, especially when the consequences of litigation are uncertain and the process is expensive. Apart from all this, postponing payment is beneficial at least to the extent of the interest on the amount during the period of delay.¹³⁶

Under no-fault plans, it is argued, benefits can be paid immediately, without the need to determine fault.

comparisons, particularly in the area of cost, are difficult. A study prepared for the Select Committee on Company Law concluded:

It is impossible to weight the apparent advantages and disadvantages of government ownership in a manner which will provide a factual or statistically supportable answer to the government versus private ownership question.¹³⁸

The following are some of the advantages and disadvantages of a publicly-run auto insurance system that have been put forward.

Advantages

- Certain cost efficiencies flow from the fact that a government agency would likely be a monopoly. A monopoly does not have to incur the expenses associated with maintaining and expanding its market position. In addition, economies of scale are available to monopolies which are not available in a competitive system. These cost savings would translate into lower premiums and a greater portion of premiums returned to the consumer as compensation.
- Social and constitutional forces are compelling the move to a common classification system, as opposed to the current system in Ontario in which different insurance companies use different classification systems. A common classification system can be more effectively implemented through a one-company public system.
- Public monopolies can set premium rates to achieve social goals, whereas private companies must follow actuarial principles.
- Public corporations are exempt from corporation tax.
- A public corporation would invest in the province, thereby assisting the achievement of other social objectives.
- A private company's revenues are limited to premiums and investment income, whereas a public corporation has access to such revenue sources as driver's licence fees and gasoline taxes.
- The public convenience will be better served by one stop claims centres under a public system, since there would be no delays from disputes between insurance companies over such issues as fault and the cost of repairs.

- Ontario law requires that a driver must have valid insurance before vehicle registration is issued or renewed. Compliance with this law can be better enforced under a public system, since a driver must obtain licence plates, renewal stickers and insurance from the same office.
- A public agency, with centralized administration and information collection, can more effectively implement driver education programs, safety research and auto repair studies.
- Since a public agency would be obliged to sell insurance to all applicants, there would be no need for a residual market mechanism to cover high-risk drivers who cannot get insurance.

Disadvantages

- While certain cost efficiencies are, in theory, available to a public monopoly, there would be no competitive pressure on a monopoly to take advantage of these potential savings.
- A uniform classification system under a public plan would lead to subsidization of high-risk drivers by low-risk drivers, resulting in higher accident rates.
- Implementing a public plan in a market the size of Ontario would involve prohibitive start-up costs, resulting in higher premiums and/or increased taxes.
- The auto insurance market represents a substantial portion of the general insurance field in Ontario. Given the importance of auto insurance to the business of most insurance companies, the exclusion of auto insurance from private company portfolios might induce companies to withdraw from the insurance market altogether, creating low capacity problems in other areas of insurance.
- Low premiums under a public plan might be illusory if they are subsidized by higher taxes.
- Hidden subsidies, such as free police and medical reports, might hide the true costs of a public plan.
- If the political accountability of the government insurance agency fails to keep premiums low, a government board might have to be created to regulate rates.

It should be noted that none of the inquiries into auto insurance in this province have specifically endorsed the adoption of a public plan. The Ontario Law Reform Commission made no recommendation either way, but did suggest that "careful

consideration" should be given to a public system. The Select Committee on Company Law recommended, "with reservations", the retention of a privately-run system. Both the Task Force and the Osborne Report strongly recommended private delivery systems. The OAIB was not requested to make recommendations on this issue.

SHOULD NON-ECONOMIC LOSS BE COMPENSATED?

Bill 164 attempts to increase access to the court system for all innocent accident victims by retaining the right to sue for non-economic loss, subject to a deductible amount.

In its 1973 *Report on Motor Vehicle Accident Compensation*, the Ontario Law Reform Commission recommended the adoption of a pure no-fault system, which would provide compensation for economic loss, but not for non-economic loss. Two main problems were identified by the Commission with the concept of compensation for non-economic loss: "the attempt to attach a price to something which is not susceptible of compensation, and calculating the amount."¹³⁹ The Commission also felt that the compensation of pain and suffering contains a punitive element, and, therefore, is inappropriate in a no-fault system.

Some legal scholars have also advocated the abolition of compensation for non-economic loss. For example, Professor H.J. Glasbeek of Osgoode Hall Law School made the following observation in his submission to the legislative committee reviewing Bill 68:

Inasmuch as it seems equitable and fair to recognize the pain and suffering and loss of amenities of an accident victim, it is also true that such recognition cannot be expressed adequately in money terms. As noted . . . judges know that they are putting a value on the invaluable. In some cases, the law has given up. Thus, in respect of loss of life expectancy, a nominal sum is awarded, precisely because the value of even one day of life of a human being cannot be measured in money

. . . . The task of putting a value on human emotions is an impossible one. The horrible guesswork which goes on in the courts when this is done is unseemly.¹⁴⁰

FOOTNOTES

¹ Allan O'Donnell, *Automobile Insurance in Ontario* (Toronto: Butterworths, 1991), pp. 1-2.

² *The Insurance Amendment Act, 1980*, S.O. 1980, c. 55.

³ Optional no-fault benefits were introduced in 1969, and became a compulsory element in the standard automobile policy in 1972 (S.O. 1971, c. 84, s. 14(1)) for those who elected to purchase automobile insurance.

⁴ *Insurance Act*, R.S.O. 1980, c. 218, s. 219(1).

⁵ *Ibid.*, Schedule C.

⁶ Ontario Law Reform Commission, *Report on Motor Vehicle Accident Compensation* (Toronto: Ministry of the Attorney General, 1973).

⁷ *Ibid.*, p. 9.

⁸ *Ibid.*, chapters II-VIII.

⁹ *Ibid.*, chapter IX.

¹⁰ *Ibid.*

¹¹ Ontario Legislative Assembly, Select Committee on Company Law, *The Insurance Industry: First Report on Automobile Insurance* (Toronto: The Committee, 1977), Part V.

¹² Ontario Legislative Assembly, Select Committee on Company Law, *The Insurance Industry: Second Report on Automobile Insurance* (Toronto: The Committee, 1978).

¹³ *Ibid.*, pp. 63-65.

¹⁴ *Ibid.*, pp. 65-66.

¹⁵ *Ibid.*, pp. 147-154.

¹⁶ *Ibid.*, chapter 9.

¹⁷ Ontario Task Force on Insurance (Dr. David Slater, Chair), *Final Report* (Toronto: The Task Force, 1986).

¹⁸ *Ibid.*, p. 73.

¹⁹ *Ibid.*, p. 80.

²⁰ The Task Force made the following comments with respect to non-economic loss:

Consideration must also be given to the so-called "pain and suffering" or non-economic component of damages. As has been emphasized in Part B above, there is already a firm cap on such damages imposed by the Supreme Court of Canada--\$100,000 in 1978 dollars, now approximately \$184,000. It must be noted that a component for pain and suffering could be built into the basic compensation system, if considered desirable by the government, and then purchased as part of the additional layers of protection. The point should be made, however, that most commentators in the personal injury compensation literature discouraged the addition of any non-pecuniary item to an injury compensation plan. The matter remains controversial and will undoubtedly have to be resolved in due course, as the no-tort insurance plan takes shape (Task Force on Insurance, *Final Report*, p. 79).

²¹ Ibid., p. 80.

²² Ibid., p. 85.

²³ Ontario, Inquiry into Motor Vehicle Accident Compensation in Ontario (the Honourable Mr. Justice Coulter A. Osborne, Supreme Court of Ontario, Commissioner), *Report* (Toronto: Ministry of the Attorney General and Ministry of Financial Institutions, 1988). Hereafter cited as the "Osborne Report".

²⁴ Ibid., pp. 519-520.

²⁵ Ibid., pp. 521-530.

²⁶ Ibid., pp. 543-544.

²⁷ Ibid., p. 540.

²⁸ Ibid., chapter 15.

²⁹ O'Donnell, *Automobile Insurance in Ontario*, p. 7.

³⁰ Ibid.

³¹ Ibid.

³² *Ontario Automobile Insurance Board Act, 1988*, S.O. 1988, c. 18.

³³ O'Donnell, *Automobile Insurance in Ontario*, p. 10.

³⁴ Ibid.

³⁵ Ibid., pp. 10-11.

³⁶ Between April 1987 and June 1990, the government permitted two rate increases of 4.5% and one increase of 7.6%. During this period the residual auto insurance market, the Facility Association, was only allowed the April 1989 increase of 7.6%: O'Donnell, *Automobile Insurance in Ontario*, p. 11.

³⁷ Ibid.

³⁸ See O.C. 612/89.

³⁹ Ontario Automobile Insurance Board, Reference: An examination of threshold no-fault and choice no-fault systems of privately delivered automobile insurance, *Report* (North York: The Board, 1989).

⁴⁰ *Insurance Statute Law Amendment Act, 1990*, S.O. 1990, c. 2.

⁴¹ Remarks by Rick Ferraro, MPP (Guelph), PA to the Minister of Financial Institutions, to the Standing Committee on General Government, Thursday, December 14, 1989. Committee exhibit 2/03/25.

⁴² Now section 266(1) of the *Insurance Act*, R.S.O. 1990, c. I.8.

⁴³ No-Fault Benefits Schedule, R.R.O. 1990, Regulation 672.

⁴⁴ Ibid., s. 6.

⁴⁵ Ibid., s. 7.

⁴⁶ Ibid., s. 11.

⁴⁷ Ibid., s. 10.

⁴⁸ Ibid., ss. 12-17.

⁴⁹ *Insurance Act*, R.S.O. 1990, c. I.8, s. 263.

⁵⁰ Ibid., s. 280.

⁵¹ Ibid., s. 281(1).

⁵² Ibid., s. 412(1).

⁵³ Ibid., s. 412(9), (10).

⁵⁴ Committee exhibit 2/03/70.

⁵⁵ Committee exhibit 2/03/72.

⁵⁶ Committee exhibit 2/03/28.

⁵⁷ Committee exhibit 2/03/336.

⁵⁸ Committee exhibit 2/03/293.

⁵⁹ For example, the Police Association of Ontario (Committee exhibit 2/03/324); the Ottawa-Carleton Public Employees Union (Committee exhibit 2/03/03); the Ontario Federation of Labour (Committee exhibit 2/03/307) and the Ontario Teachers Federation (Committee exhibit 2/03/325).

⁶⁰ Committee exhibit 2/03/308.

⁶¹ For example, the Canadian Federation of Independent Business, Committee exhibit 2/03/319.

⁶² Telephone interview with Chester Orlowski, Road User's Safety Office, Ministry of Transportation, 17 December 1990.

⁶³ Telephone interview with Tim Logie, Insurance Bureau of Canada, Statistical Division, Toronto, 16 December 1992. "Earned premium" refers to the portion of the written premium equal to the expired portion of the time for which the insurance was in effect.

⁶⁴ Survey results provided by Stan Griffin, Vice President (Ontario), Insurance Bureau of Canada, Toronto, 5 January 1993.

⁶⁵ Loss ratio figures were provided by Tim Logie, Insurance Bureau of Canada, Statistical Division, Toronto, 16 December 1992.

⁶⁶ Telephone interview with Peggy Stewart, Communications Branch, Ontario Insurance Commission, Toronto, 17 December 1992.

⁶⁷ *Meyer v. Bright*, 9 O.R.(3d) 225, at p. 232.

⁶⁸ "Ontario judges hint they'll interpret 'threshold' in auto insurance liberally", *The Lawyers' Weekly*, 4 December 1992, p. 1.

⁶⁹ "Ontario ruling widens right to sue for victims of traffic accidents," *The Lawyers' Weekly*, 29 January 1993, p. 1.

⁷⁰ As reported in "Ontario no-fault insurance 'threshold' doesn't violate the Charter," *The Lawyers' Weekly*, 18 December 1992, p. 36.

⁷¹ [1989] 1 S.C.R. 922.

⁷² "Ontario no-fault insurance 'threshold' doesn't violate the Charter," *The Lawyers' Weekly*, 18 December 1992, p. 36.

⁷³ *Ibid.*

⁷⁴ *Ibid.*

⁷⁵ *Ibid.*

⁷⁶ Bill 164, *An Act to amend the Insurance Act and certain other Acts in respect of Automobile Insurance and other Insurance Matters*, 1st Sess., 35th Leg. Ont. 40 Eliz. II, 1991 (second reading: 13 October 1992).

⁷⁷ *The Road Ahead: Ontario's Strategy For Automobile Insurance Reform*, Auto Insurance Review, Ministry of Financial Institutions, 1991. Hereafter cited as "The Road Ahead".

⁷⁸ William M. Mercer Limited, *Actuarial Costing of the Road Ahead: A Comparative Study* (Toronto: Ontario Automobile Insurance Review, Ministry of Financial Institutions, 1992).

⁷⁹ Bill 164, s. 1, and explanatory notes.

⁸⁰ *Revised Draft Regulation To Be Made Under the Insurance Act: "Statutory Accident Benefits Schedule"*, Ministry of Financial Institutions, January 1993. Hereafter cited as the "Draft regulation."

⁸¹ Draft regulation, s. 9(2), (8).

⁸² *The Road Ahead*, p. 15.

⁸³ Draft regulation, s. 14.

⁸⁴ *Ibid.*, s. 15.

⁸⁵ *Ibid.*, s. 20.

⁸⁶ *Ibid.*, ss. 23-25.

⁸⁷ *Ibid.*, s. 26(6).

⁸⁸ *Ibid.*, s. 29(1).

⁸⁹ *Ibid.*, s. 30(1).

⁹⁰ *Ibid.*, s. 17.

⁹¹ *Ibid.*, s. 32(1).

⁹² *Ibid.*, s. 33(1).

⁹³ *Ibid.*, s. 55(8).

⁹⁴ *Ibid.*, s. 34, 55(8).

⁹⁵ *Ibid.*, s. 35(1)-(5).

⁹⁶ *Ibid.*, s. 35(8).

⁹⁷ Ibid., ss. 35(3), (9).

⁹⁸ Ibid., s. 35(4).

⁹⁹ Ibid., s. 36.

¹⁰⁰ Ibid., s. 37.

¹⁰¹ Ibid., s. 38.

¹⁰² Ibid., s. 39.

¹⁰³ Ibid., s. 40.

¹⁰⁴ Ibid., s. 42.

¹⁰⁵ Ibid., s. 59(1).

¹⁰⁶ Ibid., s. 59(3).

¹⁰⁷ Ibid., s. 60.

¹⁰⁸ Ibid., s. 56.

¹⁰⁹ Bill 164, s. 24.

¹¹⁰ *The Road Ahead*, p. 18.

¹¹¹ Bill 164, s. 12(11).

¹¹² Ibid., s. 38.

¹¹³ *The Road Ahead*, p. 19.

¹¹⁴ Ibid., p. 20.

¹¹⁵ Bill 164, s. 8.

¹¹⁶ Ibid., s. 11.

¹¹⁷ Ibid., s. 49.

¹¹⁸ The Coopers and Lybrand Consulting Group, *Ontario Bill 164: The Economic Consequences For Consumers, Investors And The Automobile Insurance Marketplace* (Toronto: Coopers and Lybrand, 1992).

¹¹⁹ See "Car insurance rates to increase by \$200, study predicts," *Globe and Mail*, 12 January 1993, p. A4.

¹²⁰ Those groups opposing any regulation of entry into or withdrawal from the market included the Board of Trade for Metropolitan Toronto and the Association of Canadian

Insurers. See the briefs submitted by these groups to the Standing Committee on Finance and Economic Affairs (hereafter cited as "the Committee").

¹²¹ See briefs submitted to the Committee by the Insurance Bureau of Canada, Allstate Insurance and Zurich Insurance.

¹²² See briefs submitted to the Committee by Fair Action Insurance Reform, Canadian Bar Association (Ontario), and the Advocates Society.

¹²³ See, for example, briefs submitted to the Committee by the Windsor and Essex County Insurance Brokers Association and the Ottawa Insurance Women's Association.

¹²⁴ See briefs submitted to the Committee by Fair Action Insurance Reform, Hamilton Auto Club, Ontario Insurance Brokers Association, and the Ontario Trial Lawyers Association.

¹²⁵ See briefs submitted to the Committee by the Consumers' Association of Canada, the Ontario Psychological Association, and the Chedoke-McMaster Hospital.

¹²⁶ See brief submitted by the Insurance Brokers Association of Ontario.

¹²⁷ See briefs submitted to the Committee by Progressive Casualty Insurance Company of Canada, State Farm Insurance, and Canadian Rehabilitation Consultants.

¹²⁸ See briefs submitted to the Committee by Reinsurance Research Council, Progressive Casualty Insurance Company of Canada, Saint Michael's Hospital, Canadian Paraplegic Association (Ontario) and the Ontario Psychological Association.

¹²⁹ See briefs submitted to the Committee by Advocacy Resource Centre for the Handicapped, Insurance Brokers Association of Ontario, Fair Action Insurance Reform and the Ontario March of Dimes.

¹³⁰ See briefs submitted to the Committee by Consumers' Association of Canada, Ontario Teachers Insurance Plan, and the Ontario Federation of Labour.

¹³¹ See briefs submitted to the Committee by Advocacy Resource Centre for the Handicapped and the United Senior Citizens of Ontario.

¹³² See briefs submitted to the Committee by Nigel Gilby and Associative Rehabilitation.

¹³³ Ontario Task Force on Insurance, *Final Report*, p. 66.

¹³⁴ Osborne Report, p. 257 and pp. 523-524.

¹³⁵ Ontario Automobile Insurance Board, *Report*, p. 344.

¹³⁶ Ontario Law Reform Commission, *Report on Motor Vehicle Accident Compensation*, p. 57.

¹³⁷ Osborne Report, pp. 543-544.

¹³⁸ Woods, Gordon and Company, *Government Ownership of Automobile Insurance*, Report IX to the Select Committee on Company Law (Toronto: Woods, Gordon and Company, 1978).

¹³⁹ Ontario Law Reform Commission, *Report on Motor Vehicle Accident Compensation*, p. 15.

¹⁴⁰ Submission to Standing Committee on General Government Re: Bill 68, Committee exhibit 2/03/371.

APPENDIX

"COMPARISON OF BENEFITS UNDER BILL 68 AND BILL 164"

Source: *The Road Ahead.*

For students

Current system	New system
\$185 per week, starting at age 16, not indexed	Payment for each school year missed to age 16 (one year payable to those over 16) - \$2,000 per elementary school year - \$2,000 per secondary school semester (limit of 2 semesters per year) - \$4,000 per post-secondary school semester (limit of 2 semesters per year) Weekly Education Disability Benefit of 50% of net Average Weekly Earnings after age 16; Loss of Earning Capacity Benefits rise to a maximum 90% of net Average Weekly Earnings at age 30, indexed
Disability Benefit for those outside the labour force	\$185 per week, not indexed
One-week waiting period	One-week waiting period
Caregiver Benefit for caregivers who are not employed full-time	One-week waiting period
\$50 per week per child or dependant (\$200 limit) for non-earners only (in addition to \$185 non-earner benefit)	For all primary caregivers (per week): \$250 for one child/dependant \$50 for additional dependants
Dependant Care Benefit for earners not receiving the Caregiver Benefit	No explicit provisions Expense-incurred Dependant Care Benefit for earners (per week): \$75 for 1 child/dependant \$100 for 2 dependants \$125 for 3 dependants \$150 for 4 or more dependants
Supplementary Medical and Rehabilitation	Lifetime cap of \$500,000 10 year limit
Attendant Care	No lifetime cap No time limit
Death Benefits	Lifetime cap of \$500,000 Monthly cap of \$3,000
\$25,000 for spouse	Indexed \$3,000 monthly cap
\$10,000 to a surviving dependant or for loss of a dependant	\$50,000 - \$200,000 for spouse, or to dependants if there is no spouse
Funeral Benefits	\$10,000 to a surviving dependant or for loss of a dependant
\$3,000 ceiling	\$6,000 ceiling

Accident benefits: new versus old

Indexation

Current system	New system
No indexing of benefits and services	Income Replacement Benefits (other than the Disability Benefit) fully indexed after one year to Consumer Price Index Monthly care cap, death, funeral, income replacement benefit ceiling, Caregiver, Weekly Educational Disability, Dependant Care Benefit for earners and student lump sums fully indexed to the Consumer Price Index
One-week waiting period Based on substantial inability to perform essential tasks of employment 80% of gross income loss \$600 weekly maximum, not indexed; \$185 minimum Benefits available for 3 years; for life if totally disabled Benefit for part-time workers based on part-time earnings, or \$185 minimum No special provisions for self-employed	One-week waiting period Based on substantial inability to perform essential tasks of employment Indexed 90% of net employment income loss \$1,000 weekly maximum, indexed; \$185 minimum Disability Benefit After 2 years, Loss of Earning Capacity Benefit for total or partial disability available to age 65, then indexed pension benefit (2% of the benefits per year of disability) Part-time earnings adjusted to full-time after 2 years (indexed) Self-employed can pre-elect income base and claim expenses, e.g., additional salary to keep business operating
Income replacement, not indexed	Indexed income benefit phased down over 4 years, minimum \$185 weekly Disability Benefit

For income earners over 65



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